

**REMARKS**

The Examiner is thanked for the due consideration given the application.

Claims 1-5 and 9-17 are pending in the application. Claim 5 has been amended to recited materials disclosed in the Examples of the specification, which were discussed during the interview of October 23, 2008, and thus no new issues are raised by the amendments to claim 5. The amendments to claim 5 additionally address formalities, thus reducing issues for appeal.

No new matter is believed to be added to the application by this amendment.

Entry of this amendment under 37 CFR §1.116 is respectfully requested because it raises no new issues and places the application in condition for allowance or, alternately, reduces issues for appeal.

**Rejection Under 35 USC §112, Second Paragraph**

Claim 5 has been rejected under 35 USC §112, second paragraph as being indefinite. This rejection is respectfully traversed.

The Official Action asserts that the term "tomato whole extract" in claim 5 is unclear. However, this term has been amended to read "whole tomato extract."

Claim 5 is thus clear, definite and has full antecedent basis.

This rejection is believed to be overcome, and withdrawal thereof is respectfully requested.

**Rejections Under 35 USC §103(a)**

Claims 1, 5 and 9-17 have been rejected under 35 USC §103(a) as being unpatentable over AUSICH et al. (U.S. Patent 5,858,700) in view of KAGAN (U.S. Publication 2003/0044495) and SCHAAP (WO 03/08064). BOMBARDELLI et al. (EP 0818 225) has been added to the aforesaid rejection to reject claims 2-4. These rejections are respectfully traversed.

Distinctions of the present invention over AUSICH et al., KAGAN and BOMBARDELLI et al. are of record in the application. For brevity, these distinctions are not repeated here.

However, it is noted that AUSICH et al. produce purified lycopene crystals from tomato skins whereas the present invention uses whole tomatoes to produce an extract containing 5 to 20% of lycopene. However, AUSICH et al. at column 6, lines 9-14 discuss using various forms of tomato, including tomato skins, tomato paste and tomato tonace.

It is also notable that AUSICH et al. produce a concentrated product whereas the present invention produces an extract in which the lycopene is mixed with other materials. The examples of the present invention set forth that the abstract includes other materials such as reducing sugars (expressed as glucose), phospholipids and mono-di-glycerides.

Thus claim 5 has been amended to recite 0.28 - 4.46% reducing sugars, 12.97 - 16.1% phospholipids and 14.47 - 24.02% mono-di-glycerides. It is believed that these materials are neither taught nor inferred in the applied art references.

One of ordinary skill and creativity would thus fail to produce a claimed embodiment of the present invention from a knowledge of the applied art references. A *prima facie* case of unpatentability has thus not been made.

Further, the present invention shows unexpected results, as has been discussed in the previous amendment.

These rejections are believed to be overcome, and withdrawal thereof is respectfully requested.

#### **Statement of Substance of Interview**

The Examiner is thanked for graciously conducting a personal interview with the applicant's representative on October 23, 2008. During the Interview the patentability of the invention over the applied art was discussed, along with amendments to claim 5 that are reflected in this paper. At the end of the interview, the Examiner prepared an interview summary. The interview summary has been reviewed, and it appears to accurately reflect the substance of the interview.

#### **Conclusion**

Prior art of record but not utilized is believed to be non-pertinent against the claims.

The rejections are believed to be overcome, obviated or rendered moot, and no issues remain.

The Examiner is respectfully requested to place the application to place in condition for allowance and to issue a Notice of Allowability.

The Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 25-0120 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17.

Respectfully submitted,

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